

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

WILLIAM J. MURRAY,

Plaintiff,

-vs-

**NOTICE OF MOTION
08-CV-6383**

NEW YORK STATE, et al,

Defendants.

PLEASE TAKE NOTICE that upon all of the pleadings filed herein and the exhibits attached thereto, the Declaration of Emil J. Bove, Jr., Assistant Attorney General, and defendant's Memorandum of Law, the undersigned submits Brian Fischer's Motion to the United States District Court for the Western District of New York, at a date, time, and place to be determined, (A) to extend the deadline set forth in the June 23, 2010 Scheduling Order for Motions to Amend Pleadings, and (B) for leave to amend his Answer to include a statute of limitations affirmative defense pursuant to Rules 6 (b)(1)(B) and 15(a) of the Federal Rules of Civil Procedure, and for such other and further relief as this Court may deem just and proper.

Defendant respectfully requests he be allowed to submit reply papers.

Dated: April 5, 2011
Rochester, New York

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York
/s/ Emil J. Bove, Jr
Emil J. Bove, Jr.
Assistant Attorney General of Counsel
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

WILLIAM J. MURRAY,

Plaintiff,

-vs-

08-CV-6383

NEW YORK STATE, et al,

Defendants

ATTORNEY DECLARATION

Emil J. Bove, Jr. Esq., affirms under penalty of perjury pursuant to Rule 43(d), as follows:

1. I am an Assistant Attorney General on the staff of Eric T. Schneiderman, Attorney General of the State of New York. I have been assigned to represent the interests of the defendant, Brian Fischer, in connection with the above matter.

2. I am submitting this Declaration in support of defendant Brian Fischer's motion pursuant to Rules 6 (b)(1)(B) and 15 (a) of the Fed. R. of Civil Procedure to extend the deadline set forth in the June 23, 2010 Scheduling Order for motions to amend pleadings and for leave to amend his Answer to the Amended Complaint so as to include the affirmative defense that some or all of plaintiff's claims are barred by the statute of limitations applicable to Actions brought under 42 U.S.C § 1983.

3. Plaintiff commenced this Action on August 22, 2008 by filing a Complaint with the Clerk of this Court with claims against the State of New York and the New York State Department of Correctional Services. Docket Number 1.

4. In November 17, 2008, the Court dismissed plaintiff's claims for lack of subject matter jurisdiction without prejudice to plaintiff filing an amended complaint within thirty (30) days of the date of entry of the Decision and Order. See, Docket Number 8.

5. On December 18, 2008, plaintiff filed an Amended Complaint and on January 7, 2009, he filed a Motion for Leave to Amend. On September 1, 2009, the Court granted plaintiff's Motion for Leave to Amend and the Amended Complaint was filed on September 2, 2009. See Docket Numbers 9, 11, 29, and 30.

6. In the Amended Complaint, plaintiff added Brian Fischer and other defendants and Judith Ratner of the Department of Civil Service as parties. He asserted claims against them under 42 U.S.C §1983 alleging that since April 1, 2004, defendants harassed him and discriminated against him after he exercised his rights under the First Amendment to the United States Constitution. Docket Number 30, ¶¶ 17 to 20.

7. On November 20, 2009, defendant Brian Fischer filed and served an Answer to the Amended Complaint which did not contain a statute of limitations affirmative defense. Docket Number 35. It appears that a statute of limitations defense may be successful in this Case. See, Memorandum of Law submitted in support of this Motion.

8. The remaining defendants moved to dismiss the Amended Complaint and their Motion was denied in part on September 15, 2010. See, Docket Numbers 32 and 52. Then, on October 8, 2010, the same defendants, not including Brian Fischer, filed Answers which contained a statute of limitations affirmative defense. They also filed a Motion for Reconsideration on November 21, 2010 concerning the September 15, 2010 Decision.

Their Motion was granted on December 14, 2010. Docket Numbers 55, 56, 60, and 68. The defendants, other than Brian Fischer, then acknowledged service and filed a second Motion to Dismiss. Docket Numbers 71, 77, and 78.

9. For the reasons set forth in the Memorandum of Law submitted in support of this Motion, defendant Brian Fischer respectfully requests that he be granted leave to amend his Answer pursuant to Rule 15 (a) of the Fed Rules of Civil Procedure to include a statute of limitations affirmative defense. A proposed amended Answer is submitted herewith as Exhibit A.

10. Defendant submits that the deadline for filing this Motion should be extended under Rule 6 (b)(1)(B). The affirmative defense in question has been asserted in the other Answers filed in this Action and the statute of limitations will be an issue in this case in any event. Amendment of Brian Fischer's Answer insures consistency of defendants' responses.

11. No previous application has been made for the relief sought herein.

WHEREFORE, defendant Brian Fischer respectfully requests that the Court grant him leave to amend his Answer to include a statute of limitations affirmative defense, and that the Court grant such other relief as to it seems just.

Declared: April 5, 2011
Rochester, New York

/s Emil J. Bove, Jr
EMIL J. BOVE, JR.

CERTIFICATE OF SERVICE

I certify that on April 5, 2011, I electronically filed the above Motion with the Clerk of the District Court using CM/ECF system, which sent notification of such filing to the following:

1. None

And, I hereby certify that I have served, by the United States Postal Service, the document to the following non-CM/ECF participant(s):

1. William Murray
4887 Gahwiler Road
Auburn, NY 13021

Eric T. Schneiderman
Attorney General
of the State of New York
Attorney for Defendant Brian Fischer

s/Emil J Bove Jr
EMIL J. BOVE, JR.
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EXHIBIT A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

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-vs-

NEW YORK STATE, et al

Defendants.

ANSWER

08-CV-6383

JURY TRIAL DEMANDED

Defendant, Brian Fischer, by his attorney, Eric T. Schneiderman, Attorney General of the State of New York, Emil J. Bove, Jr. Esq., Assistant Attorney General, of counsel, in answer to the Amended Complaint, Docket Number 30, herein alleges:

1. Denies the allegations of the Amended Complaint which allege in any manner that the actions of the defendants resulted in a deprivation of the plaintiff's constitutional rights.
2. Denies the commission or awareness of, or responsibility for, any acts of omission or commission relative to plaintiff's allegations constituting a violation of any rule, regulation, directive, policy, or statute of the State of New York, or the United States, or the Constitution of either, which would confer jurisdiction upon this Court pursuant to 28 U.S.C. §§1331 and 1343.
3. Denies plaintiff has alleged facts, actions, occurrences, or omissions sufficient to establish a claim for equitable or monetary relief, or a cause of action against the defendants pursuant to 42 U.S.C. §1983.

4. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in the portions of the Amended Complaint entitled, "Preliminary Statement", "Jurisdiction", "Venue", and "Parties", except he admits he is Commissioner of the NYS Department of Correctional Services.

5. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in the portion of the Amended Complaint entitled "Facts" in paragraphs 7, 8 thereof, and denies the remaining allegations in said portion of the Amended Complaint .

6. Denies the allegations in paragraphs of the Amended Complaint numbered 17 through 21.

7. Denies each and every other allegation of the Amended Complaint not heretofore admitted, denied, or otherwise controverted.

**AS AND FOR A FIRST, SEPARATE AND
COMPLETE AFFIRMATIVE DEFENSE,
DEFENDANT ALLEGES:**

8. That the Amended Complaint fails, in whole or in part, to state a claim upon which relief can be granted.

**AS AND FOR A SECOND, SEPARATE AND
COMPLETE AFFIRMATIVE DEFENSE,
DEFENDANT ALLEGES:**

9. That Defendant, at all times relevant hereto, acted without malice and under the reasonable belief that his actions were proper and in accordance with existing law.

10. That Defendant, at all times relevant hereto, acted in good faith in the lawful exercise of the discretion committed to him under state law and is immune from liability and entitled to qualified immunity.

**AS AND FOR A THIRD, SEPARATE AND
COMPLETE AFFIRMATIVE DEFENSE,
DEFENDANT ALLEGES:**

11. That upon information and belief, plaintiff has failed to exhaust his remedies.

**AS AND FOR A FOURTH, SEPARATE AND
COMPLETE AFFIRMATIVE DEFENSE,
DEFENDANT ALLEGES:**

12. That the alleged conduct was, in whole or in part, properly within the discretionary authority committed to the defendant to perform his official functions, and the relief prayed for would constitute an improper intrusion by the federal judiciary into said discretionary authority.

**AS AND FOR A FIFTH, SEPARATE AND
COMPLETE AFFIRMATIVE DEFENSE,
DEFENDANT ALLEGES:**

13. The doctrine of respondeat superior does not apply in actions brought pursuant to 42 U.S.C. §1983, and bars relief to the plaintiff.

**AS AND FOR A SIXTH, SEPARATE AND
COMPLETE AFFIRMATIVE DEFENSE,
DEFENDANT ALLEGES:**

14. That this action is barred, in whole or in part, by the Eleventh Amendment to the United States Constitution.

AS AND FOR A SEVENTH, SEPARATE AND

**COMPLETE AFFIRMATIVE DEFENSE,
DEFENDANT ALLEGES:**

15. That this action is barred, in whole or in part, by collateral estoppel or res judicata.

**AS AND FOR A EIGHTH, SEPARATE AND
COMPLETE AFFIRMATIVE DEFENSE,
DEFENDANT ALLEGES:**

16. Some or all of the claims in this Action are barred by the Statute of Limitations.

**AS AND FOR A NINTH, SEPARATE AND
COMPLETE AFFIRMATIVE DEFENSE,
DEFENDANT ALLEGES:**

17. All actions taken by the Department and its employees concerning plaintiff were taken for proper reasons and were not taken in retaliation.

WHEREFORE, defendant prays that judgment be entered dismissing the Amended Complaint in all respects and that reasonable costs and attorneys' fees and be awarded, and for such other relief as may be just, proper, and equitable.

Dated: April 5, 2011
Rochester, New York

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York
Attorney for Defendant Fischer
s/EMIL J. BOVE, JR
EMIL J. BOVE, JR
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State of New York
144 Exchange Boulevard, Suite 200
Rochester, New York 14614
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emil.bove@oag.state.ny.us

CERTIFICATE OF SERVICE

I certify that on _____, I electronically filed the foregoing Answer with the Clerk of the District Court using CM/ECF system. And, I hereby certify that I have mailed, by the United States Postal Service, the document to the following non-CM/ECF participant(s):

1. William J. Murray
4887 Gahwiler Road
Auburn, NY 13021

Attorney General of the
State of New York
Attorney for Defendant Fischer
s/EMIL J. BOVE, JR
EMIL J. BOVE, JR
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